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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM 1991

JEAN MARIE ST. GELAIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

ARE UNITED STATES DISTRICT COURTS REQUIRED TO GIVE TRIAL JURIES A SEPARATE, SPECIFIC INSTRUCTION ON THE DEFENSE OF GOOD FAITH WHEN IT IS A RECOGNIZED DEFENSE TO THE CHARGES ON TRIAL, HAS SUPPORT IN THE EVIDENCE, AND IS REQUESTED IN A TIMELY FASHION?

II.

WAS THE DENIAL OF THE DEFENSE THEORY OF THE CASE INSTRUCTION AND BAR ON THE PRESENTATION OF THE GOOD FAITH DEFENSE A DENIAL OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO TRIAL BY JURY.

Parties

The Parties to the proceeding whose judgment is sought to be reviewed are as follow:

1. Jean Marie St. Gelais
   Defendant/Appellant/Petitioner
2. United States of America
   Prosecutor/Appellee/Respondent
3. Solicitor General of the United States
   Washington, D. C.

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OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals is found in Record Opinion No. 90-2726 decided on the 14th day of January 1992. (App. 1). The decision denying a Petition for Rehearing with a Suggestion for Rehearing En Banc is an unpublished denial entered on the 31st day of March 1992 (App. 18).

JURISDICTION

The decision of the three-judge panel of the Fifth Circuit Court of Appeals was entered on the 14th day of January 1992. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on the 31st day of March 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 and §2101.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are Amendments V and VI to the Constitution of the United States. They read as follows:

V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case involves a lengthy jury trial on six separate counts of aiding and abetting wire fraud in violation of 18 U.S.C. § 1343 and § 2. There was no conspiracy charged in the indictment.

The facts of the case concern the formation of six partnerships to borrow money for the purpose of oil and gas drilling and exploration. Each partnership's loan was separately bonded (guaranteed) by Mutual Marine Fire and Midland Insurance Company of Pennsylvania, hereinafter "Mutual". Five of the loans were placed by Interdiscount Limited, a loan brokerage house in New York. Interdiscount selected Crossland Savings Bank as the lending institution for five of the loans. The sixth loan was placed with Anchor Savings Bank of Kansas City upon suggestion of Don Sargent who worked for Mutual. Interdiscount was paid a commission for placing five of the loans. Sargent was also paid a commission.

Payments were made on the loans as scheduled. After the sudden, unexpected collapse of the domestic oil and gas markets in 1985, the loans at issue went into default.[1]

The central facts important to consideration of the issues presented in this Petition concern the evidence which supported the defense of good faith; the trial court's failure to give the jury a separate, specific instruction on that defense; and the trial court's erroneous ruling that the accused could not present the

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[1] The loans had been bonded, dollar for dollar, by Mutual. Mutual had been rated at A+ 12 by A. M. Best Company which is a highly regarded bond rating concern. It appears as though Mutual's executives had been raking in enormous profits by bonding too many obligations. They had bonded well over Four Hundred Million Dollars ($400,000,000) worth of obligations. That far exceeded the scope of their bonding capacity. As the result of Mutual's over-extending itself, Pennsylvania regulatory authorities placed a temporary halt to all of their business activities. This meant that they could not fully repay these partnership loans. They did make partial repayment.

defense of good faith to the jury because, in the court's view, the evidence was not sufficient to support it.

There was more than sufficient evidence to support the defense of good faith in this case. The indictment alleged that Mr. St. Gelais was part of a scheme to defraud two lending institutions, a bonding company, and a discount brokerage house to obtain money. The plan allegedly included the submission of false, forged or misleading documents. By the time all the evidence had been presented, even the prosecutor recognized that the brokerage house, Interdiscount, had not been defrauded of anything and had lost nothing. The prosecutor also made it quite clear to the jury that none of the investors in the partnerships at issue had been defrauded. He not only told the jury that the investors were not defrauded in his opening statement, but he also made that clear to them in his closing. (T-IId.opening:13, VII:149; closing:74).[2] Insofar as the claim of forgery of investors signatures is concerned, neither the prosecutor nor any witness ever claimed that Mr. St. Gelais forged anything. In fact, the District Court had earlier ruled in a civil case that there were no forgeries. There was also no evidence that Mr. St. Gelais had ever asked anyone to forge anything or that he knew anything was forged. The prosecutor told the jury that he could not claim that any investor's signature was forged.[3] (T-closing:74).

The evidence of good faith presented during trial includes, but is not limited to, by way of example only, the following:

1. According to prosecution witnesses, the bonding company was obligated to check on the investors and their loan packages and did its job properly. It used

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[2] Use of "(T-)" is to the indicated volume and page of the transcript of the record of this case. A "d" in the reference would indicate a docket entry associated with that transcript volume.

[3] The Court of Appeals below somehow got the mistaken idea that Mr. St. Gelais had forged investors' signatures. (App. 2). That is totally incorrect. It has no support in the record.

due diligence when deciding whether to guarantee the promissory notes in question. (T-III:38).

2. Jean St. Gelais prepared only his own financial statement and none others. It was accurate.

3. The financial institutions which actually lent the money were not selected by nor approached by Jean St. Gelais. They were selected by the brokerage house, Interdiscount. These lenders did *not* rely on the lending packages when deciding to lend the money; rather, they relied on the bonds and Mutual's A+ 12 rating. (T-IV:77; IVd.112:31). No one hindered or interfered with the lending companies in any way in their examination of whatever they wanted to see for their decision making process.

4. The discount house which placed the loans was paid its fees and commissions. (T-IVd.112-51, 52).

5. The lending institutions were paid interest until the unexpected collapse of the oil and gas market. (T-IIId.111:17).

6. According to the prosecutor, no investors were defrauded. (T-IId.opening:13; VII:149; closing:74).

7. According to the prosecution, more money was spent on the projects than was borrowed from the lending institutions, thereby indicating that individual partners contributed their own funds. (T-XII:49).

8. The prosecution's evidence also established that money borrowed for the purpose of drilling oil and gas wells was spent for that purpose as intended. (T-IV:97; V:10; VI:86, 89, 90, 92, 97; VII:96, 97, 124, 153).

9. The prosecution's chief witness, F.B.I. Agent Eldridge, had no idea how much money had been

spent for drilling and related expenses. (T:XII:54). During the five years this case had been investigated, the prosecution had not gone through all of the boxes of documents nor subpoenaed all of the invoices to find out what amount was spent on drilling. (T-XII:54, 63).

10. Mr. St. Gelais, according to the partnership agreements and other evidence presented by the prosecutor, earned and was entitled to commissions, management fees, and reimbursement of operating costs. (T-XII:64-66, 70, 74). He was also allowed to borrow money from the partnerships and was entitled to advances against future earnings. He did receive money. It was paid openly and marked clearly on the books and records. There was no evidence that he was not entitled to the money that was paid to him.

11. Some of the money expended on behalf of Mr. St. Gelais released encumbrances on oil drilling equipment which was then used in these projects to drill for oil and gas. (T-XI:54, 88).

At the conclusion of all the evidence, defense counsel presented the court with a proposed instruction that laid out the defense theory of the case for the jury. That theory was that Mr. St. Gelais had acted in good faith. Good faith is an absolute defense to wire fraud. If the jury, after considering all the evidence, determined that Mr. St. Gelais had acted in good faith, then they had to acquit him of all charges. The trial judge viewed the evidence as not being strong enough to allow Mr. St. Gelais to use the good faith defense. (T-XII:7). The court barred the defense from presenting their theory of the case to the jury.

When the trial court banned the defense of good faith, counsel for Mr. St. Gelais was forced to realign his case and refocus it on other issues. Mr. St. Gelais never had the benefit of his lawyer and the trial court's instructions focusing the jury

on the defense of good faith. The defense lawyer was not allowed to tell them what evidence supported the defense of good faith and then point to instructions from the court which informed them of the legal basis for an acquittal. (T-XII:7).

Deprived of his defense and barred from focusing the minds of the jury on the evidence and the law which showed his innocence the accused was convicted of all charges. The court imposed almost the maximum penalty.[4] This fifty-four (54) year old man received a sentence of twenty-four (24) years, a One Million Dollar ($1,000,000) fine, and was ordered to pay restitution of all monies borrowed (approximately Twelve Million Dollars ($12,000,000)). He received no consideration in the restitution order for repayments made before the collapse of the oil and gas market, nor for the monies paid as commissions to the brokerage house, for bond premiums, or the like.

The case was appealed to the United States Court of Appeals for the Fifth Circuit which overturned the One Million Dollar fine because, at the time the offense occurred, the maximum fine allowed by law on all counts combined could not exceed Six Thousand Dollars ($6,000). The Court of Appeals was asked to follow the practice in the Eighth and Tenth Circuits of requiring a separate and specific instruction on the good faith defense in cases of this type. The Circuit Court declined and adhered to prior decisions of the Fifth Circuit that a separate and specific instruction of good faith is not required.

There is a clear split in the various Circuit Courts of Appeals on this jury instruction issue. It needs resolution. The trial court below improperly barred the good faith defense. As a result of the court's actions, the accused was denied a jury decision on his defense and was also denied effective assistance of counsel.

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[4] His effective prison term is nearly double that of someone similarly situated and convicted of the exact same offenses today. U.S.S.G. § 2F1.1

ARGUMENT

I. There Is a Split in the Circuit Courts of Appeal on Whether or Not Trial Judges Must Give a Separate and Specific Instruction on the Defense of Good Faith.

The defense in this case was that Mr. St. Gelais had acted in good faith. The trial court would not allow the defense to be presented because, in its view, the evidence in support of this defense was "insufficient". (T-XIII:7). The Court of Appeals recognized that the trial court had no basis to completely bar the defense of good faith, but ruled that no specific instruction on that defense need be given since that is the contemporary practice in the Fifth Circuit.[5] (App. A-5).

There is a clear conflict in the circuits on this issue and this Court should hear this case to resolve it. The Tenth Circuit, in an *en banc* decision rendered in 1984, held that defendants are entitled to a specific jury instruction on the good faith defense where, as here, one has been requested and evidence exists to support the theory. *United States v. Hopkins*, 744 F.2d 716, 717 (10th Cir. 1984) (*en banc*). In *Hopkins*, the Tenth Circuit held:

> "The 'good faith' instruction is required to be given as a separate subject. Thus, instructions on willfulness, on aspects of intent, on untruth of representations or fraudulent statements are *not* sufficient for this purpose. There must be a full and clear submission of the good faith defense as such. *Id.* at 718. (Emphasis in the original) (citations omitted).

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[5] The Court of Appeals opinion did not address the trial court's improper ban of the defense theory of the case. It was not necessary to consider this error according to the Appeals Court because the defense theory was implied. (App. A-6). Defense by implication gleaned from careful scrutiny of the transcript of an oral argument is significantly less than the law requires.

In *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), the Eighth Circuit Court of Appeals also recognized that juries in lengthy complex cases, such as the one before this Court, need a specific instruction when the defense is good faith. *Id.* at 223. This is necessary in order to properly direct their attention and focus it on the existence of that defense. After all, the prosecution has the court focus the jury on its theory in the reading of the indictment as well as in the separate instructions which, in essence, repeat the indictment as the individual elements of the offense are stated. Requiring the jury to pick and pluck hither and thither through the instructions in order to glean the defense theory deprives the accused of the court's focusing the jury on the defense theory.

An accused is entitled to specifically have his or her theory of the case presented in a separate instruction so long as there is some evidence to support it. *Mathews v. United States*, 485 U.S. 58 (1988); *Stevenson v. United States*, 162 U.S. 313 (1896). There should not be an exception to this well recognized rule for the good faith defense. Allowing only one side, the prosecution, to have its theory spelled out directly and specifically is not fair. Both sides are entitled to have their theory clearly presented. Both the Eighth and Tenth Circuits recognize this. *United States v. Hopkins*, *supra*; *United States v. Casperson*, *supra*. Those charged with other offenses have their defenses expressly and specifically instructed to the jury by the court. *Stevenson v. United States*, *supra*; *Mathews v. United States*, *supra*. Those charged with aiding and abetting fraud are entitled to the same, equal treatment.

The Fifth and some other circuits, by contrast, hold to the contrary insofar as the good faith defense is concerned. As the Third Circuit Court of Appeals recognized in *United States v. Gross*, ___ F.2d ___, 50 Cr.L. 1132 (3rd Cir. 1992) (Record No. 91-1520 decided 20 April 1992, corrected 4 May 1992), there is a direct and concrete conflict between various circuit courts

of appeal on this precise issue. The view of the Fifth and its allied circuits, as expressed in the opinion below, is that a specific instruction need not be given on the good faith defense in a fraud case so long as the issue is covered somewhere in the instructions as a whole. (App. A-5). They do not believe that the defendant is entitled to have the trial court specifically focus the jury's attention on the defense theory of the case if the defense is good faith.

The view of the Eighth and Tenth Circuits is more consistent with this Court's holdings in such cases as *Stevenson v. United States*, *supra*; *Mathews v. United States*, *supra*, and *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991). Both *Mathews* and *Cheek* recognize the critical importance of the defense being allowed to present its theory to the jury and, more importantly for this issue, the significance of the court's instructions as a point of embarkation for the arguments of counsel.

Trial courts are to act as the neutral arbiter between the prosecution and the accused. They are to favor neither side. The court's instructions to the jury are to convey the legal theory of each side evenly. Both are entitled to have their position clearly and cohesively instructed by the court. This does not occur when a defense theory such as good faith is not expressly instructed, as such, to the jury.

II. It Is A Violation Of The Fifth And Sixth Amendments To Deprive The Accused Of His Defense

This Court has long held that a defendant in a criminal case has a right to have the jury instructed on any recognized defense so long as the request is made in a timely manner and there is evidence which supports the theory. *Stevenson v. United States*, *supra*.[6] In *Stevenson* there was evidence to support a manslaughter instruction and an instruction on the defense of

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[6] There is no dispute that good faith is an absolute defense to fraud.

self-defense. The accused was allowed both instructions because they were supported by the evidence, notwithstanding the fact that self-defense is inconsistent with killing in the heat of passion (manslaughter). A more recent decision on this issue, *Mathews*, *supra*, recognized that an accused can present defense theories as divergent as I did not do it, and if I did, I was entrapped. Allowing inconsistent defenses represents a practical understanding of the reality of criminal trials. The evidence, as it actually is presented to the jury, can often lead to more than one potential basis for the jury's determination that the accused is not guilty. Allowing alternative defenses, even if inconsistent, recognizes the importance of permitting the accused to fully and completely defend the accusations against him or her. After all, the prosecution can present more than one option of guilt even though there may be only one punishment. *Prince v. United States*, 352 U.S. 322 (1957); *North Carolina v. Pierce*, 395 U.S. 717 (1969).

The inestimable importance of a clear presentation of a litigant's theory was also recognized in *Cheek*, *supra*. There, the accused, as the defendant in this case, wanted to claim the defense of good faith. A good faith instruction was given in *Cheek*, but the trial court, in response to a jury question, indicated that whether the individual was acting in good faith must be judged from an objectively reasonable standard. Notwithstanding the thin layer of evidence supporting the good faith defense in that case, this Court ruled that Mr. Cheek was entitled to the good faith instruction and that, even if Cheek's underlying belief was irrational, it might still provide a defense. It was up to the jury to make that decision and they were to view it from a subjective perspective. The trial court in the case giving rise to this Petition banned the good faith defense all together. The attorney for Mr. St. Gelais was told, after the evidence was closed, that he could not defend on that ground. (T-XIII:7)

There certainly was more evidence of good faith in the case being presented here than there was in *Cheek*. Mr. Cheek was charged with failing to file income tax returns and income tax evasion. He took the position that he was exempt from taxes. Prior to the indictment, he had been involved in at least four civil cases that challenged the federal income tax system. In each of those cases, the plaintiffs had been informed by the courts that their argument that they were not taxpayers within the meaning of the tax laws and that wages were not income, were frivolous or had been repeatedly rejected by the courts. Mr. Cheek had also attended at least two criminal trials on tax offenses and had been advised by an attorney that his claim that wages were not income was frivolous. Notwithstanding that, he still claimed that his actions were in good faith and rested his assertion on information he had received from some tax resistance group and his own study. Cheek's evidence was considerably weaker than the good faith evidence in Mr. St. Gelais' case.

In Mr. St. Gelais' case, the evidence indicated that the lending institutions had based their decisions to fund the loans on the validity of the bonding agreement which guaranteed the loans, the bonding company's high rating and its due diligence in determining whether or not the loans should be bonded. The evidence also established that no investors had been defrauded. Money had been spent, as intended, on oil and gas drilling. Mr. St. Gelais was entitled to various fees and payments and had received them in an open, over the counter manner.

The court below had no basis to tell defense counsel that he could not present the good faith defense to the jury because, in the court's view, the evidence was insufficient to support it. It is not for a trial judge to weigh in its view of how it would vote on the evidence when making a determination as to whether or not to allow a defense theory to be presented to the trial jury. Even if no specific instruction is given on the defense theory, that does not justify totally barring the defense from presenting

its theory to the jury. Mr. St. Gelais was unduly denied his defense. He was denied effective assistance of counsel and the right to have the jury decide his case.

This Court has been consistent from the decision in *Stevenson* through the recent decisions in *Mathews* and *Cheek* in holdings that an accused is entitled to a new trial when he or she has been deprived of a jury instruction presenting his theory of the case. The requirements have been that the instruction be a correct statement of the law, be made in a timely manner, and have evidentiary support. What has not been quite so clear, is the quantum of evidence necessary. Generally, most courts adhere to the proposition that "... the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however, tenuous." *United States v. Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969). It would be helpful for this Court to grant this Petition and clearly enunciate that standard. It is implicit in *Mathews* and *Cheek*. It ought to be explicit.

This Court should also take this opportunity to clarify whether or not the good faith defense is subjective as a general proposition. *See e.g. United States v. Donovan*, ___ F.2d ____, 50 Cr.L. 1442 (1st Cir. 1992) (Record No. 91-1574 decided 6 February 1992) (subjective good faith limited exclusively the tax cases).

CONCLUSION

Had Mr. St. Gelais been tried in either the Eighth Circuit or the Tenth Circuit, the jury would have been instructed on his theory of defense and his lawyer would have been allowed to argue to the jury why the application of the law to the facts required acquittal. Even the Circuit Court Panel below recognized his entitlement to the good faith defense. This Court ought to grant this Petition so that the question of whether or not an accused is convicted or acquitted in this sort of case is not dependent on the circuit in which he is prosecuted.

Respectfully submitted,

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NO. 90-2726

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEAN MARIE ST. GELAIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(January 14, 1992)

Before THORNBERRY, DAVIS, and WEINER, Circuit Judges.

THORNBERRY, Circuit Judge:

The defendant, Jean Marie St. Gelais, was indicted and convicted on six counts of aiding and abetting wire fraud in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2. The district court sentenced St. Gelais to serve six consecutive four year prison terms, and to pay a fine of $1,000,000 and restitution of $12,120,244.29. St. Gelais appeals the validity of his conviction and the fine and restitution imposed.

Background

The six fraudulent wire transfers for which St. Gelais was convicted were part of a very involved and complicated scheme.

In summary, St. Gelais sent fraudulent and misleading documents to an insurance company to induce the insurance company to issue surety bonds on promissory notes. St. Gelais then used the surety bonds to secure large loans from two financial institutions.

In order to carry out his scheme, St. Gelais created various limited partnerships allegedly for the purpose of oil and gas exploration and drilling. The investors for the limited partnerships were his son, his girlfriend, other individuals, and companies owned or operated by him that were worth little or nothing. Each investor supposedly contributed $37,000 cash to the partnership and signed a promissory note to pay an additional $187,000. The government introduced evidence at trial to show that St. Gelais fraudulently induced some investors to sign promissory notes and simply forged signatures on others.

The next step in the scheme was to get the promissory notes bonded by a reputable company so that St. Gelais, through the limited partnerships, could borrow against the notes. St. Gelais sent private placement memoranda describing the purpose of the limited partnerships to Mutual Fire, Marine and Inland Insurance ("Mutual") so that Mutual could determine whether the limited partnership met its criteria for bonding. He also sent an "investor package" for each investor or limited partner which contained the individual investor's financial statement, a signed pledge agreement, and two copies of the promissory note. Mutual relied on these documents to certify the financial condition of the limited partners, and hence, in bonding the promissory notes.

Once Mutual issued surety bonds on the promissory notes, St. Gelais, on behalf of the limited partnerships, approached the financial institutions for loans. He procured loans for the limited partnerships' alleged purpose, gas and oil exploration and drilling, from Metropolitan Savings Bank, now Crossland Savings Bank, ("Metropolitan"), and Anchor Savings Bank ("Anchor"),

using the promissory notes as security. The financial institutions wired over $13 million to St. Gelais during the summer of 1984. Of course, the various limited partners defaulted on the promissory notes and the loan payments were not paid to Metropolitan and Anchor. Mutual, having bonded the notes, partially paid the loss to the financial institutions, but eventually stopped paying due to its own insolvency.

St. Gelais was indicted on six counts of aiding and abetting wire fraud and was convicted on all six counts. On appeal he claims (1) that the district court erred by not including a specific good faith instruction in the jury charge; (2) that the district court erred by instructing the jury that it could convict St. Gelais on the basis of a scheme substantially similar to the scheme contained in the indictment; (3) that the district court erred by not instructing the jury that only Mutual could have been an intended victim of the scheme and that, as a result of the failure to give that instruction, the jury's verdict is flawed; (4) that the district court imposed the fine under 18 U.S.C. § 3623 in violation of the ex post facto clause;[1] and (5) that the district court erred by not articulating factual findings regarding the fine imposed or the restitution ordered, pursuant to 18 U.S.C. § 3572 and § 3664, respectively. We find that the $1,000,000 fine was imposed in violation of the ex post facto clause and remand for sentencing on that basis only. We affirm the district court's opinion in all other respects.

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[1] In St. Gelais' original brief he argued, as an additional point of error, that the district court ordered that he pay the restitution as a pre-condition of parole. The government responded, stating that the payment of restitution was not a pre-condition of parole but rather a condition to be met during the course of parole. St. Gelais agreed in his reply brief that if the government's interpretation was correct, the district court had not erred by imposing restitution as a condition of parole. Since the district court clearly adopted the probation department's recommendation that payment of the restitution be a requirement of parole as allowed by 18 U.S.C. § 3579(g), not a pre-condition of parole, this issue is no longer contested.

Analysis

A. The Good Faith Instruction

St. Gelais claims that the district court erroneously ruled that the defense of good faith was not supported by the evidence and committed reversible error by refusing to include a good faith instruction in the jury charge. Although we need not reach the issue of whether the evidence supported the defense of good faith, we find that the district court did not commit reversible error by refusing to include the good faith instruction.

"A district court's refusal to include a defendant's proposed jury instruction in the charge is reviewed under an abuse of discretion standard." *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir. 1990). The district court abuses its discretion only if three conditions exist: (1) the requested instruction is substantively correct; (2) the requested instruction is not substantially covered in the charge given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to effectively present a particular defense. *United States v. Hunt*, 794 F.2d 1095, 1097 (5th Cir. 1986). Under this test, "[t]his Court will not find an abuse of discretion where the instructions fairly and adequately cover the issues presented by the case." *Rochester*, 898 F.2d at 978.

St. Gelais cites *United States v. Goss* as authority for his contention that "if there is any evidentiary support whatsoever for a legal defense, and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing to charge the jury." *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981). St. Gelais fails to recognize, however, that *Goss* "must be read in light of later cases which indicate that the failure to instruct on good faith is not fatal when the jury is given a detailed instruction on specific intent and the defendant had the opportunity to argue good faith to the jury." *Rochester*, 898 F.2d at 978 (citing *United States v. Hunt*, 794

F.2d 1095 (5th Cir. 1986)). Regardless of whether the evidence supported the defense of good faith, the court's definition of specific intent required the jury to consider any good faith St. Gelais may have demonstrated before finding him guilty of wire fraud.

The jury charge stated that

> What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise or join a scheme to defraud substantially the same as the one alleged in the indictment. . . .
>
> The word "knowingly" as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident.
>
> The word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law.

(R., Vol. 20 at 18-19).

The court's instruction on specific intent required a showing of "bad purpose" for conviction. In this case, just as in the *Rochester* case, "the jury could only find specific intent after taking the evidence regarding good faith into account." *Rochester*, 898 F.2d at 979. Thus, the concept of good faith was adequately conveyed to the jury and the district court's refusal to include a specific instruction is not reversible error. *See United States v. Luffred*, 911 F.2d 1011, 1016 (5th Cir. 1990) ("When the court instructs the jury as to the government's burden of proving that the defendant's conduct was willful and

then properly defines that term, it adequately conveys the concept of the good faith defense.").

Although the court's charge, taken as a whole, is sufficient to support our finding that the district court did not commit reversible error by refusing to include a specific good faith instruction, we also point out that, despite St. Gelais' assertion that the defense of good faith was not argued to the jury, the trial transcript reveals numerous statements in defense counsel's closing arguments that implicitly raised the defense of good faith. For example, St. Gelais' counsel stated that the prosecution had discovered over the course of the investigation that "there is no motive for Mr. St. Gelais to involve himself in an inappropriate financial or business deal." (R., Vol. 28 at 22). Counsel also argued that Mr. St. Gelais' disclosures regarding the purchase of a penthouse allegedly with the loan funds were "consistent with, not inconsistent with, open and honest dealing." (R., Vol. 28 at 34). Finally, defense counsel argued throughout his closing argument that business practices were very different in 1984 compared to business practices in 1990. When discussing the false representation that each investor had put cash into the limited partnerships, defense counsel argued that

> In each and every one of these pledge agreements, there's a representation that an investor has, in fact, put money down in these programs. When you look back through the crystal clear eyes of 1990 at the way business was run in 1984, when you take the position the government does, . . . you overlook the way business was run back then.
>
> As I said, money flowed like oil. The surety didn't care about the down payment, nor did the lending agencies like Anchor Savings or Metropolitan.

(R., Vol. 28 at 26). This statement and others like it imply that St. Gelais acted in good faith because he did not do anything that was unacceptable by 1984 standards. Furthermore, defense counsel implied that St. Gelais acted in good faith and was simply a victim of the economy when he stated that there was "[n]o way on earth, no way on earth to make money on these programs" and that "you couldn't have gone into a drilling program at a worst [sic] time." (R., Vol. 28 at 54).

We find that the court's charge adequately conveyed the concept of good faith to the jury and that, while defense counsel did not mention the words "good faith" in his closing argument, his remarks put the concept of good faith and innocent motive before the jury. Thus, the district court did not commit reversible error by refusing to include a specific good faith instruction in the jury charge.

B. The Instruction Regarding the Scheme

St. Gelais also contends that his conviction should be reversed because the district court's charge constructively amended the indictment and let the jury convict him on the basis of conduct outside the scope of the indictment. This argument is completely without merit.

In his brief, St. Gelais alleges that the court's charge allowed the jury to find a scheme larger than or different from the one charged in the indictment. This claim is defeated by this court's holding in *United States v. Soudan*, 812 F.2d 920 (5th Cir. 1986) *cert denied*, 481 U.S. 1052, 107 S.Ct. 2187 (1987). In *Soudan*, the district court instructed the jury that "what must be proved is that the accused knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the indictment." *Soudan*, 812 F.2d at 929. This court held that the court's charge allowed the jury a "basis upon which to find the defendant criminally culpable within the scope of the indictment," and that no constructive amendment or prejudicial variance was evident. *Soudan*, 812 F.2d at 929.

In this case, the instruction St. Gelais complains of is the same instruction the district court gave in *Soudan*: "what must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised . . . a scheme to defraud substantially the same as the one alleged in the indictment." (R., Vol. 20 at 18-19). The district court in this case also admonished the jury that the "Defendant is not on trial for any act or conduct or offense not alleged in the indictment." (R., Vol. 20 at 15). This court ruled in *Soudan* that this same instruction "guaranteed [that] the jury did not return a guilty verdict on a theory which broadened the scheme outlined in the indictment." *Soudan*, 812 F.2d at 929. Thus, St. Gelais has not demonstrated any flaw in the verdict.

C. The Victims of the Scheme

St. Gelais' argument supporting this point of error is difficult to decipher, but he appears to allege that the evidence did not support a finding that he intended to defraud Metropolitan or Anchor and that the district court erred by not instructing the jury that only Mutual could have been an intended victim of the scheme. He goes on to argue that, because the court did not instruct the jury that only Mutual could have been a victim of the scheme to defraud, the jury rendered a flawed verdict. He alleges that the verdict is flawed in two respects: (1) the verdict might not have been unanimous because the jury was not required to agree on Mutual as the only intended victim, and (2) the jury might have convicted him on the basis of noncriminal conduct since, if Mutual was the only intended victim, any misrepresentations he made to Metropolitan or Anchor did not violate the wire fraud statute. These two arguments rely on a finding that the court erred by not instructing the jury that Mutual could have been a victim of the scheme.

St. Gelais raises this objection to the jury charge for the first time on appeal. "Where a defendant fails to object to a jury instruction at trial and raises the issue first on appeal, an appel-

late court will uphold even an inaccurate jury instruction provided no 'plain error' has resulted from the inaccuracy." *United States v. Birdsell*, 775 F.2d 645 (5th Cir. 1985) *cert denied*, 476 U.S. 1119, 106 S.Ct. 1979 (1986) (citing *United States v. Reeves*, 752 F.2d 995, 1000 (5th Cir.) *cert. denied*, 474 U.S. 834, 106 S.Ct. 107 (1985)). We find that the instruction was accurate and that no plain error resulted.

"A wire fraud offense under § 1343 requires proof of (1) a scheme to defraud and (2) the use of, or causing the use of, wire communications in furtherance of the scheme." *United States v. Shively*, 927 F.2d 804, 813 (5th Cir.) *cert. denied sub nom., Johnson v. United States*, 111 S.Ct. 2806 (1991). Not only must a defendant intend to defraud or deceive, but he must intend for some harm to result from the deceit. *United States v. Starr*, 816 F.2d 94, 98 (5th Cir. 1987) ("Only a showing of intended harm will satisfy the element of fraudulent intent."). St. Gelais argues that the did not intend to deprive Metropolitan or Anchor of property since Mutual was ultimately responsible for paying the loans. As support for this argument, he relies on *McNally v. United States*, 107 S.Ct. 2875 (1987) in which the Supreme Court held that deceitful conduct that does not contemplate harm to property rights is outside the scope of the mail and wire fraud statutes. He asserts that Mutual's responsibility to pay the loans precludes a finding that he intended to harm Metropolitan and Anchor's property rights, as required by *McNally* for a wire fraud conviction.

This court addressed the scope of *McNally* in *United States v. Judd*, 889 F.2d 1410 (5th Cir.) *cert. denied sub nom., Poodry v. United States*, 110 S.Ct. 1494 (1990). The defendants in *Judd* claimed that the court erred in instructing the jury that "intent to defraud could be found if the defendants acted 'knowingly with the specific intent to deceive ordinarily for the purpose of causing some financial loss to another or bring about some financial gain to oneself.'" *Judd*, 889 F.2d at 1414. Specifical-

ly, the *Judd* defendants claimed that the inclusion of the phrase "or bringing about financial gain to oneself" violated the Supreme Court's holding in *McNally* that § 1343 applied only to the deprivation of a victim's property rights. *Judd*, 889 F.2d at 1414. This court held that the instruction was correct, writing that

> *McNally* is read much too broadly when it is claimed to require that the mail and wire fraud convictions can be sustained only if motivated by intent to cause financial loss to another. The Supreme Court in *McNally* held only that the intangible right to good government is not covered by the mail and wire fraud statutes.

Judd, 889 F.2d at 1414. The district court in the case at bar gave the same instruction as the district court in *Judd*: "To act with intent to defraud means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self." (R., Vol. 20 at 17). St. Gelais intended to deceive Metropolitan and Anchor in order to bring about his own financial gain. Pursuant to this court's decision in *Judd*, intent to defraud another for your own financial gain constitutes the specific intent to defraud as required by the wire fraud statute. Thus, St. Gelais' contention that he intended only to defraud Mutual fails. Accordingly, St. Gelais' contention that the verdict was flawed because (1) the jury based the conviction on noncriminal conduct and (2) might not have unanimously agreed that Mutual was the only victim, must also fail.[2]

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[2] Even if St. Gelais alleged, regardless of whether mutual was the only intended victim, that the verdict was flawed because the charge did not separately instruct the jury to unanimously agree on the victims, his argument would fail. He does not cite a single case to support his assertion that, in addition to instructing the jury that its verdict must be unanimous, the court must separately instruct the jury to unanimously agree on the intended victim. The cases St. Gelais relies on stand only for the well established proposition

D. The Violation of the Ex Post Facto Clause

St. Gelais claims that the district court imposed a one million dollar fine in violation of the ex post facto clause of the United States Constitution. We hold that the fine was imposed in violation of the ex post facto clause and remand for resentencing on the issue of the fine.

The district court imposed a $1 million fine under the Criminal Fine Enforcement Act of 1984, which was codified at that time under 18 U.S.C. § 3623. Section 3623 provided that "[a]n individual convicted of an offense may be fined ... in the case of a felony, $250,000" for any offense committed between January 1, 1985 and November 1, 1987. For wire fraud offenses committed before January 1, 1985, the applicable fine of $1,000 per count was provided by the wire fraud statute. *See* 18 U.S.C. §1343. Thus, if St. Gelais committed the wire fraud after January 1, 1985, his maximum fine would be $1,500,000 ($250,000 for each of six counts); while, if he committed the wire fraud prior to January 1, 1985, the maximum fine allowed by § 1343 would be $6,000 ($1,000 for each of six counts).

All six wire transfers for which St. Gelais was convicted occurred in 1984. The government contends that although the actual transfers occurred in 1984, St. Gelais' scheme to defraud continued into 1985 and should be treated as a continuing offense. We disagree. Each wire transmission in furtherance of a scheme to defraud constitutes a separate crime. *See United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984) (each separate use of the mail in furtherance of a scheme to defraud constitutes a separate crime). It is not the scheme to defraud but the use of the mails or wires that constitutes mail or wire fraud.

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that, in order to demonstrate the requisite intent to defraud, the defendant must have intended some harm to a victim. These cases discuss the need for an intended victim only in relation to the specific intent requirement and do not, by any means, hold that the court must separately instruct the jury to unanimously agree on each intended victim of the scheme.

See United States v. Ashdown, 509 F.2d 793, 798 (5th Cir.) *cert. denied*, 423 U.S. 829, 96 S.Ct. 48 (1975). Hence, St. Gelais committed the offenses for which he was convicted in 1984.

The district court imposed a fine in violation of the *ex post facto* clause because it imposed the maximum fine applicable to offenses committed after January 1, 1985 rather than the maximum fine allowed by § 1343 for offenses committed prior to January 1, 1985. *See United States v. Suarez*, 911 F.2d 1016, 1021 (5th Cir. 1990) (an increase in sentence based on an amendment to the sentencing guidelines effective after the offense was committed violates the *ex post facto* clause). We remand the case for imposition of a fine in accordance with this opinion.

E. The Restitution

St. Gelais alleges that the district court erred by not specifically articulating its findings regarding the mandatory factors it considered when imposing restitution.[3] We review the district court's award of restitution for an abuse of discretion. *United States v. Ryan*, 874 F.2d 1052 (5th Cir. 1989). We find that the district court neither abused its discretion in choosing not to articulate its findings nor in determining the amount of restitution.

> In determining the amount of restitution the district court shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

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[3] St. Gelais also raises this point of error with regard to the fine. Since we find that the case must be remanded for the imposition of a fine in accordance with § 1343, we need not address whether the district court erred in failing to articulate specific findings regarding the fine.

18 U.S.C. § 3664. St. Gelais contends that the district court's failure to articulate its findings resulting from consideration of each of these factors mandates a remand. The Fifth Circuit, however, does not require specific findings regarding the restitution factors in every instance:

> The decision to assign reasons is committed to the sound discretion of the district court, guided by this singular inquiry—absent an assignment of reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Ryan, 874 F.2d at 1053. Thus, we examine the record in this case and find that it provides an adequate basis for the district court's decision to order full restitution.

The district court adopted the finding in the presentence report that the amount of the victims' loss was $12,120,244.29. St. Gelais objected to the amount of loss alleged in the presentence report, claiming that the most the victims could have lost was $3.5 million. The government argued that the total amount of loss was $13,215,024. The government carries the burden of proving the amount of victims' loss under 18 U.S.C. § 3664, and the district court resolves any dispute as to the proper amount of restitution by a preponderance of the evidence. 18 U.S.C. § 3664(d). The district court did not abuse its discretion in adopting the presentence report's finding that the total loss amounted to $12,120,244.29.

In addition to considering the amount of the victims' loss, the district court must consider the financial resources of the defendant, and the financial needs and earning ability of the defendant. The district court clearly attempted to consider these factors, but St. Gelais refused to provide the court with this

personal financial statement. When the court questioned St. Gelais' attorney about this fact at sentencing, his attorney stated that St. Gelais would soon be examined by creditors in a bankruptcy proceeding and that he would provide that information to the court when it was available. (R., Vol. 29 at 16). The court had no choice but to impose full restitution because by statute, the burden of demonstrating the financial resources of the defendant rests with the defendant. *See* 18 U.S.C. § 3664. The district court did state that if necessary, it could "amend the sentence insofar as it deals with restitution if in fact [St. Gelais] does submit to such an under-oath interrogation." (R., Vol. 29 at 17). The district court did not abuse its discretion in finding that the amount of loss amounted to $12,120,244.29 and in imposing restitution in full. The district court did not abuse its discretion in choosing not to articulate all of its findings because the record provides an adequate basis for the court's decision to impose full restitution.

Conclusion

Because St. Gelais committed all six wire fraud offenses prior to January 1, 1985, we remand this case only for the assessment of a fine pursuant to § 1343.

NO. 90-2726

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEAN MARIE ST. GELAIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(March 31, 1992)

Before THORNBERRY, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/

(Homer Thornberry)
United States Circuit Judge

NO. 90-2726

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEAN MARIE ST. GELAIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion January 14, 5 Cir. 1992, _____ F.2d _____)
(March 31, 1992)

Before THORNBERRY, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

(Homer Thornberry)
United States Circuit Judge